IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 224

PUBLIC UTILITIES COMMISSON OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT RADIO, INC., *Petitioners*,

v.

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, the appellees below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on June 1, 1951 (R. 132).

OPINIONS BELOW.

The opinion and order of the Public Utilities Commission (R. 114-122) appealed by respondents to the United States District Court for the District of Columbia is unreported.

The opinion of the District Court (R. 2-3) dismissing the original petition of appeal is unreported. The opinion of the United States Court of Appeals for the District of Columbia reversing the District Court (R. 124-131) is reported in F. (2d) .

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on June 1, 1951 (R. 132), and a petition for a re-hearing was denied on July 6, 1951 (R. 167). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and the District of Columbia Code, 1940, Title 43, Section 705.

QUESTIONS PRESENTED.

(1) Whether the reception of radio programs on the vehicles of a private carrier, operating under governmental authority and subject to governmental regulation, is "governmental action" within the meaning of the Fifth Amendment to the Constitution.

(2) Whether a minority of passengers objecting to radio broadcasts on streetcars and buses are deprived of liberty without due process of law under the Fifth Amendment when, after hearing, the Public Utilities Commission upon an investigation initiated by it finds on the basis of substantial evidence of record that such radio reception tends to promote public convenience, comfort, and safety by improving conditions under which the public rides and then dismisses its own investigation on those subjects.

(3) Whether the Government is required by the Fifth Amendment to restrain communication with public conveyances if some passengers object or whether, instead, the liberties protected by the Fifth Amendment are relative and subject to the adjustment of competing private interests for the benefit of the general public by the legislative and

executive branches of the Government acting in accordance with established processes of law.

(4) Whether radio communication of news, weather reports, and other announcements that are important to the convenience and safety of the public are protected by the First Amendment to the Constitution only if commercial advertising messages are not included or whether such commericial messages are protected by the First Amendment when their elimination by Government would terminate the dissemination of constitutionally protected information to the public.

(5) Whether the public has a constitutional right to utilize the services of a private common carrier or whether such rights as they may have exist only by virtue of existing statutes.

(6) Whether the Commission erred as a matter of law: (a) in failing to find that radio reception on Capital Transit vehicles constituted unreasonable service; (b) in finding such reception not inconsistent with public convenience; and (c) in failing to stop such reception.

(7) Whether any private rights of respondents were invaded by the Commission's order dismissing its own investigation limited to questions of public convenience, comfort, and safety.

(8) Whether the court may consider and weigh matters outside the record before the Commission and the court, find ultimate facts different than the Commission found, reach contrary conclusions, and then require the Commission to proceed in accordance therewith.

STATUTES INVOLVED.

The pertinent constitutional and statutory provisions are printed in the Appendix, *infra*.

STATEMENTS OF FACTS.

In 1948 Capital Transit and Washington Transit Radio, Inc. (Transit Radio), entered into a contract under which Transit Radio installed and maintained radio receiving equipment in a substantial number of Capital Transit vehicles without cost to the latter (R. 34, 102-110).

The radio programs received on the vehicles consist primarily of music interspersed with news, weather reports, other announcements important to the convenience and safety of the public, and commercial announcements (R. 38, 75, 86).[1] The radio signal is regularly checked and kept at a low level for comfortable listening (R. 96-100). Both subjective and objective tests show that the radio signals do not hinder or prevent normal communication (R. 31-33, 76), and it is not possible to measure acoustically any difference in sound level contributed by the radio reception (R. 91-93, 96, 101, 113).

After a number of months of operation of transit radio, the Commission in 1949, after notice of investigation pursuant to Section 43-415 and 43-416, D. C. Code, 1940, held a public hearing on the questions of public convenience, comfort, and safety presented by such notice (R. 28, 29).[2] The Commission proceeding was not initiated on the complaint of respondents, but they were allowed to intervene in the investigatory proceeding. After the hearing the Commission issued its opinion and Order No. 3612 dismiss-

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[1] "Commercials" are limited to 60 seconds duration each, not to exceed six minutes in each hour (R. 106).

[2] A large part of the Commission's record of the Proceedings before it was not certified to the Court of Appeals as a part of the record. Respondents did not designate any part of the Commission record as part of the record so certified. Petitioners designated the Commission's order and such parts of the Commission's record as they deemed necessary for consideration of the questions raised on appeal by Respondents. By stipulation of the parties and by order of the District Court, only such parts of the Commission's record as had been designated were certified to the Court of Appeals as the record.

ing its investigation. The bases for its order were its findings and conclusions that (a) radio reception on transit vehicles is "not an obstacle to safety of operation"; (b) "public comfort and convenience is not impaired . . . and [radio reception] tends to improve the conditions under which the public rides"; and (c) the installation and use of radios on transit vehicles "is not inconsistent with public convenience, comfort and safety" (R. 120). No question has been raised by Respondents as to the substantiality of the evidence in support of the Commission's findings.

Respondents are part of a small minority who object to such radio program reception.[3] They appealed to the District Court, pursuant to Section 43-705, D. C. Code, 1940, to review the Commission's order dismissing its own investigation. The District Court dismissed their appeal after concluding that "there is no legal right of the petitioners [respondents] . . . which has been invaded, threatened or violated by the action of the Public Utilities Commission . . ." (R. 3). The Court of Appeals reversed the District Court with instructions to vacate the Commission's order and remand the case to the Commission for further proceedings in conformity with its opinion.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that the actions of a privately owned common carrier, operating under governmental authority and subject to governmental regulations, is "governmental

[3] The Commission found that a public opinion survey employing the rules of random selection showed that 93.4% of the passengers were not opposed to transit radio, 76.3% were in favor, 13.9% didn't care, 3.2% didn't know, and 6.6% were not in favor. Of the 6.6%, only 3% were firmly opposed to transit radio. (R. 119.) These findings are supported by the record (R. 35, 38, 69, 70, 71), which showed that the survey was made by trained investigators under scientific conditions (R. 62-71), and that the results in Washington are comparable with the favorable public opinion in other areas (R. 40-42, 85).

action'' within the meaning of the Fifth Amendment to the Constitution;

(2) In holding that reception of broadcasts in the vehicles of a privately owned carrier deprive objecting passengers of liberty without due process of law;

(3) In holding that the Government is required by the Fifth Amendment to restrain communication with public conveyances if some passengers object and in failing to hold that the liberties protected by the Fifth Amendment are relative and subject to the adjustment of competing private interests for the benefit of the general public by the legislative and executive branches of the Government acting in accordance with established processes of law;

(4) In holding that the First Amendment does not protect the dissemination of news programs, weather reports, and other announcements important to the convenience and safety of the public and that it does not protect ''commercial advertising'' where the necessary effect of its elimination would be to terminate the dissemination of news, music, and other information important to the convenience and safety of the public;

(5) In failing to hold that that public has no constitutional right to utilize the services of a common carrier;

(6) In holding that the Commission erred as a matter of law: (a) in failing to find that radio reception on Capital Transit vehicles constitutes unreasonable service; (b) in finding such reception not inconsistent with public convenience; and (c) in failing to stop such reception;

(7) In holding that respondents' private rights were invaded by the Commission's order dismissing its own investigation into questions of public convenience, comfort, and safety;

(8) In reviewing and vacating the Commission's order on the basis of matters outside of the record certified to

it and matters not a part of the evidence of record before the Commission;

(9) In requiring the Commission to conduct further proceedings.

REASONS FOR GRANTING THE WRIT.

Petitioners submit that a writ of certiorari should be granted in this case under Subdivisions 5(b) and 5(c) of Rule 38 of this Court, because:

(1) The question whether there is a constitutionally protected right of freedom from listening is a novel question of general importance relating to the construction of the Fifth Amendment to the Constitution of the United States, which has not been, but should be, settled by this Court. The application of that Amendment to the actions of a private carrier in receiving radio programs on its vehicles is unprecedented, a fact attested by the decision of the lower court, wherein it stated: "No occasion had arisen until now to give effect to freedom from forced listening as a constitutional right" (R. 128). Settlement of the question by this Court is in the public interest since it is presented in other similar situations throughout the country (R. 40), where a transit company is operating pursuant to governmental regulation.

(2) The lower court throughout its decision confuses the Constitutional limitations upon governmental power to restrain communication with its novel theory that the Constitution requires Government, without regard to its legislative will, to restrain communications. The Court apparently relies upon the case of *Kovacs* v. *Cooper*, 336 U. S. 77, as support for this principle. In the *Kovacs* case this Court upheld a municipal ordinance prohibiting loud and raucous sound trucks in public streets as not being in violation of the First Amendment. However, the *Kovacs* case did not hold that the City was compelled by the Constitution to pro-

hibit the noise and that, if it did not do so, its failure to prohibit the noise would deprive persons annoyed by it of liberty without due process of law. The lower court has applied this latter construction of the *Kovacs* case.

(3) The decision of the court below is in conflict with the well settled principle that the Fifth Amendment "is a limitation only upon the powers of the general Government", *Talton* v. *Mayes*, 163 U. S. 376, 382, and is not directed against the actions of individuals, *Corrigan* v. *Buckley*, 271 U. S. 323.

The holding of the court below that actions of Capital Transit constitute "governmental action" because it operates under governmental authority, because it enjoys a virtual monopoly since competition is only permitted if public convenience is served,[4] and because its services are regulated by the Commission pursuant to an Act of Congress, is in conflict with decisions of this Court and of the Third Circuit Court of Appeals.[5] This Court held in the *Civil Rights Cases*, 109 U. S. 3, that the acts of common carriers do *not* constitute "governmental action". It is also in conflict in principle with the decision of the Third Circuit Court of Appeals in *McIntire* v. *William Penn Broadcasting Company of Pennsylvania*, 151 F. (2d) 597.

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[4] The court below referred to Section 4 of the Merger Act (Section 44-201, D. C. Code, 1940) as preventing competition. That Section permits competition when the public interest requires it under a standard essentially the same as provided in the familiar provisions of the Interstate Commerce Act which permit a wide range of discretion in the Commission in permitting competition. See *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U. S. 236; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. In fact another carrier is authorized to do business within the District. (R. 39).

[5] It might also be noted that the lower court's decision is in conflict with the District Court for the Western District of Missouri in the case of *Lundberg* v. *Chicago Great Western Ry. Co.*, 76 F. Supp. 61, wherein the court refused to hold that the actions of a railroad came within the prohibitions against governmental action set forth in the Fifth and Fourteenth Amendments.

In support of its holding that the actions of a privately owned common carrier are "governmental action", the court below has cited the cases of *Smith* v. *Allwright*, 321 U. S. 649, and *Rice* v. *Elmore*, 165 F. (2d) 387, holding that the acts of political parties performing governmental functions constitute "governmental action"; *Marsh* v. *Alabama*, 326 U. S. 501, holding that the acts of a privately owned town performing governmental functions were "governmental actions"; and *American Communications Association* v. *Douds*, 339 U. S. 382, in which it was conceded by all parties, and contested by none, that an act of Congress is "governmental action". These cases are clearly inapposite. In relying upon them, the court below completely misapplied them and extended their holdings beyond any boundaries remotely suggested by this Court. The functions of a common carrier are not governmental functions even though its services involve the public interest and may be subject to governmental regulation.

The dismissal of the Commission's investigation did not elevate the prior independent actions of Capital Transit to the level of governmental action. The Commission's order only dismissed its own investigation into public questions of convenience, comfort, and safety. It did not dismiss any complaint of respondents, nor did it determine any of their private rights. Radio reception on transit vehicles was initiated and continues independently of, and without the necessity for any order of, the Commission sanctioning such reception. Section 43-705, D. C. Code, 1940, under which respondents appealed to the District Court, does not authorize appeals from actions of Capital Transit, Transit Radio, or of Congress. It authorizes appeals only from orders of the Commission under prescribed conditions.

(4) The lower court's decision that the dissemination of programs by Capital Transit and Washington Transit Radio are not protected by the First Amendment, because such programs have as a part thereof commercial advertising, is in conflict with the decisions of this Court in the cases

of *Jamison* v. *Texas*, 318 U. S. 413, and *Schneider* v. *State of New Jersey*, 308 U. S. 147. In the *Jamison* case it was held that the dissemination of constitutionally protected information cannot be prohibited under the First Amendment merely because commercial advertising is also used in connection therewith. Since a substantial part of the constitutionally protected information disseminated by radio and press is intermingled with, and economically supported by, commercial advertising, it is in the public interest to settle the question whether the government may constitutionally terminate these media of mass communication by holding commercial advertising unlawful.

(5) The lower court has taken upon itself to reconcile and adjust competing constitutional interests, to balance the relevant factors, and to ascertain which of the competing interests is to prevail. There is no specific legislation governing the subject. In so doing the lower court has made itself the arbiter of the paramount public interest, and its decision involves a question of substance concerning the extent of the Commission's and Court's duties and powers under the applicable statutes. The court below also has intruded directly upon the legislative function of determining the public interest and the constitution of reasonable service, although such function has been delegated to a regulatory body. In so intruding, the court below has acted in direct conflict with this Court's decision in the case of *Honolulu Rapid Transit and L. Company* v. *Hawaii*, 211 U. S. 282. See also *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246.

(6) In holding that radio reception on Capital Transit's vehicles deprived objecting passengers of constitutional rights, the court below ignored the prior decisions of this Court which show that passengers have no constitutional rights to use the services of Capital Transit and that their rights are governed wholly by statutes that do no more than require equal and non-discriminatory treatment of all.

Civil Rights Cases, supra, page 25 of 109 U. S.; *Hollis* v. *Kutz,* 255 U. S. 452, 454-455.

(7) The court below has so far departed from the accepted and usual course of judicial proceedings on review of administrative orders, contrary to the specific requirements of Sections 43-705 and 43-706, D. C. Code, 1940, as to call for an exercise of this Court's power of supervision. The court has, contrary to the cited statutes, vacated the Commission's order on the basis of evidence not of record before the Commission or certified to that court and has directed further proceedings by the Commission in the absence of any statutory duty of the Commission to proceed. See *N. L. R. B.* v. *Newport News S. & D. D. Co.,* 308 U. S. 241, 249. In considering matters outside of the record certified to it, the lower court has acted in violation of Rule 75(g) F. R. C. P., which states that "only matter certified and transmitted constitutes the record on appeal".

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Federal Constitution.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes.

Section 43-415, D. C. Code, 1940. Hearings after summary investigation.

If after making such investigation the commission becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation. Ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinbefore provided. (Mar. 4, 1913, 37 Stat. 984, ch. 150, Sec. 8, par. 45.)

Section 43-416, D. C. Code, 1940. Notice of hearing—Hearing to be conducted as though complaint had been filed.

Notice of the time and place for such hearing shall be given to the public utility and to such other interested per-

sons as the commission shall deem necessary, as provided in section 43-410, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint. (Mar. 4, 1913, 37 Stat. 984, ch. 150, sec. 8, par. 46.)

Section 43-705, D. C. Code, 1940. Appeal to District Court from certain orders—Precedence over other, civil causes—Proceeding when additional evidence proper—Statement to accompany decision—Subsequent appeals—Commission not liable for costs or damages.

The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: *Provided*, That the parties with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. All such proceedings shall have precedence

over any civil cause of a different nature pending in said court, and the District Court of the United States for the District of Columbia shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Said Commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any supersedeas bond or security for costs or damages on any appeal whatsoever. Said Commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor required in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of the United States. (Mar. 4, 1913, 37 Stat. 989, ch. 150, sec. 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, sec. 2.)

Section 43-706, D. C. Code, 1940. Appeal limited to questions of law.

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious. (Mar. 4, 1913, 37 Stat. 989, ch. 150, sec. 8, par. 66; Aug. 27, 1935, 49 Stat. 883, ch. 742, sec. 2.)

Section 44-201, D. C. Code, 1940. Competing lines—Certificates of convenience and necessity.

No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public. (Jan. 14, 1933, 47 Stat. 760, ch. 10, sec. 4.)

Rules.

Rule 75(g), Federal Rules of Civil Procedure. Record on Appeal to a Court of Appeals.

Record to be Prepared by Clerk—Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court, a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on ap-

peal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification. (As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.)